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No....
IN THE

Supreme Court of the United States

October Term, 1982

JOHN B HOLWAY, Petitioner,

vs.

SELWYN SMITH, Respondant.

PETITION FOR A WRIT OF CERTIORARI
TO THE VIRGINIA SUPREME COURT

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Questions Presented

1. Whether respondent judge's refusal to permit petitioner to defend himself in court violated petitioner's constitutional right to due process and equal protection of the laws.

2. Whether the refusal to let a defendant defend himself is an action "normally performed" by a judge for purposes of judicial immunity.

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JOHN B HOLWAY, Petitioner,

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PETITION FOR A WRIT OF CERTIORARI
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Petitioner John B Holway respectively prays that a Writ of Certiorari issue to review the judgment and opinion of the Virginia Supreme Court entered in this proceeding on September 15 1982.

OPINIONS BELOW

The ruling of the Virginia Supreme Court is reproduced as Appendix B hereto. The order of the Circuit Court of Prince William County is reproduced as Appendix A.

JURISDICTION

The ruling of the Virginia Supreme Court was entered on September 15 1982. This Petitition for Certiorari was filed within 90 days of that date. The Court's jurisdiction was invoked under Section 28 USC section 1254 (1) and Section 1257 (3), and 28 USC Section 1332 (a)(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution

First Amendment (in relevant part):

"Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fifth Amendment (in relevant part):

"No person shall be... deprived of life, liberty or property, without due process of law."

Seventh Amendment (in relevant part):

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved..."

Fourteenth Amendment (in relevant part):

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Virginia Constitution, Bill of Rights, Section II:

"All authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal, before any binding decree can be passed affecting his rights in liberty or property."

STATEMENT OF THE CASE

The facts of the case are as follows:

The case had its origin in September 1977 in a suit in circuit court, Manassas Virginia in a case involving Holway and one Jonathan England involving ownership of $25,000 worth of property. England was awarded ownership. Holway later discovered that England's attorneys, Mark P Friedlander and Clifford Shoemaker, had deliberately lied in court about the true contents of a case they cited in their argument. Holway was not allowed by Judge Percy Thornton to see the fraudulent citation at the time. When Holway discovered the fraud later, his appeal was over-ruled by the Virginia Supreme Court under its Rule 5.21, which requires that a judge's error be pointed out to him at the time it is made in order for an appeal to be successful.

Holway then brought suit to recover ownership of additional equipment not included in the first ruling. That suit was heard by Judge Selwyn Smith, the Respondent. In a demurrer, Friedlander stated that the property had been included in Thornton's earlier ruling. Holway pointed out to Smith that Friedlander's statement was palpably false, easily disproved by the record. He asked that Friedlander be sworn to tell the truth, as are non-lawyer witnesses in court. Smith denied the motion, and Friedlander repeated the untrue statement in his oral argument.

Holway then wrote a formal petition to Smith under Section 54.74 of the Code of Virginia, requesting a formal investigation of Friedlander's alleged "illegal, corrupt, dishonest, unworthy, and unprofessional conduct." He inclosed letters from two Commonwealth's Attorneys and one official of the Virginia State Bar, all of whom had refused to institute disciplinary action against Friedlander and all of whom stated that lying by lawyers in court is not considered either criminal or wrongdoing under the laws of Virginia.

Smith replied that he also would take no action,

Smith replied that he also would take no action, saying it would be "most inappropriate" to investigate (as he is required to do by 57.74), since he might later sit in judgment on the matter.

In a related hearing, Holway made a motion that, in view of the several legal opinions that lying by lawyers in court is permitted under the law, the attorneys and himself, acting pro se, be sworn to tell the truth. Smith again rejected the motion. Holway thereupon took the oath himself and invited Friedlander voluntarily to do the same.

At this, Smith exploded angrily. However, his anger was not directed at Friedlander, the accused liar, but at Holway, the victim of the lies. Smith told Holway that his patience was wearing thin and that the jails had "plenty of room" for Holway, who was in danger of being thrown into one if he persisted in discussing the subject of the integrity of lawyers in court.

Smith's minatory outburst was in clear violation of the First Amendment's guarantee of freedom of speech and the right to petition for redress of grievances.

Friedlander then repeated his earlier statement that ownership of the property had been settled by the earlier cases. Holway told Smith he was prepared to prove that this was deliberately untruthful.

Smith listened to Friedlander's argument for the plaintiff in full. Holway had just begun his case for the defense when Smith, still out of control of his temper, abruptly and summarily stopped him and announced that Holway was "not professional," that he was therefore finding for the plaintiff, and that the case was closed. Holway attempted to protest but was angrily gaveled to silence.

Holway thereupon brought suit against Smith for actual and punitive damages. In a demurrer, Smith claimed judicial immunity. Holway argued that the US Supreme Court, in Stump v Sparkman (1978) 435 US 349, withheld immunity from judges whose actions are not actions "normally performed" by a judge. Smith offered no evidence that his action was one normally taken by a judge. However, his demurrer was upheld in the Manassas Circuit Court and by the Virginia Supreme Court.

REASONS FOR GRANTING THE REVIEW

I.

WHATEVER OTHER JUDICIAL ACTION MAY CONSTITUTE CONSTITUTIONAL DEPRIVATION, FAILURE OF PROCEDURE DUE PROCESS DOES. DAHL V AKINS (1980) 630 F.2D 277.

"The right to due process is absolute," the Supreme Court has ruled, Carey v Piphus (1978) 435 US 247. Wrote Chief Justice Earl Warren:

'The minimum requirements of due process include "the opportunity to be heard in person and to present witnesses and documentary evidence." Morissey v Brewer (1972) 408 US 471.

The Virginia Constitution's Bill of Rights, section 11, says:

"All authorities agree that due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his rights to liberty or property."

II .

SMITH HAS FAILED TO MEET THE STUMP TEST FOR IMMUNITY

Judicial immunity is not granted to judges by the United States Constitution. It is not granted by the US Congress. It is granted by judges themselves to themselves.

However, even judges have ruled that "judicial immunity is not absolute and unlimited; it does not immunize every state court judge in every lawsuit... a 'judicial act' is determined by the character of the act, not the character of the actor." Doe v County of Lake (1975) 399 F.Supp 553

Or, as another federal court put it:

"The doctrine of judicial immunity should not be applied broadly and indiscriminately. The status of the defendant (judge) should be looked beyond and consideration must be given to the nature of his conduct." Gregory v Thompson (1974) 500 F.2d 59.

The Supreme Court confirmed that doctrine in Stump v Sparkman, (1978) 435 US 349. Immunity is available only for "judicial" acts, it said, not for a judge's administrative or ministerial acts. It is the nature of the act, not the title of judge, which determines immunity.

The Stump Court laid down two tests.

One, is the act correctable on appeal?

When a judge "acts in a manner that precludes all resort to appellate or other judicial remedies ... he is entitled to no judicial immunity," Justice Powell wrote.

This confirmed an earlier ruling, Moore v Dempsey (1923) 261 US 26, in which the Supreme Court held the entire proceedings of a lower court a sham and a "mask" and noted that no corrective process in a state court was provided. As noted above, Smith made sure that no appeal could succeed, under Rule 5.21 of the Virginia Supreme Court, by ordering Holway to stop talking, thus preventing him from pointing out Smith's unconstitutional error, as well as other errors, for the record.

But the main test of a "judicial act," the Stump Court said, is "whether it is a function normally performed by a judge."

The question before the Court is:

When Smith prevented Holway from defending himself in court, was he taking an action "normally performed by a judge"?

Selwyn Smith is believed to be the only judge in the history of American jurisprudence, in any of the 50 states, in 206 years, who has ever refusedto let a defendant defend himself.

And Virginia is now the only one of the 50 states whose Supreme Court has officially ruled that not allowing a defendant to be heard in court is an action "normally performed" by judges in that state!

At no time has Smith offered evidence to support his claim that his action is one "normally performed by a judge." Nor has the Virginia Supreme Court offered any precedent in support of its alarming ruling.

In fact, of course, Smith's action is not one normally performed by a judge. It is, thank God, an action never performed by a judge in this country, although it is, sadly, normal in many other countries, such as Russia, Poland, China, Cuba, Argentina, Guatemala, Iran, Uganda etc.

Selwyn Smith's action stands as the single most blatant, most monstrous denial of due process found in any US legal reference.

Professor Irene Marker Rosenberg writes in the Virginia Law Review (1978) vol 64, p 849:

"When a judge structures a controversy such that one side is necessarily precluded from presenting any evidence concerning the decision to be made, the court's actions properly can be viewed as jurisdictional error rather than as a mere error in the exercise of power." (See Mullane v Central Hanover Bank, 1950, 339 US 306, and Milliken v Meyer, 1940, 311 US 457.)

She adds that when constitutional errors are of such a magnitude as to deprive the proceedings of the indicia of fundamental fairness, the Supreme Court has declared that the tribunal lacked "jurisdiction" and that its actions are subject to attack. (See Blackledge v Perry, 1974, 417 US 21, and Frank v Mangum, 1915, 237 US 309.)

In Rankin v Howard (1980) 632 F.2d 844, a federal court ruled that a judge's private prior agreement to decide in favor of one party is not a "judicial act" for purposes of judicial immunity. "Conniving with a party to predetermine the outcome of a judicial prodeeding is not a function normally performed by a judge and frustrates the other party's expectation of judicial impartiality," it said.

In Mack v Johnson (1977) 430 F.Supp 1139, a prisoner charged that a prison disciplinary proceeding had failed to let him be heard before ordering punishment. The court agreed that "frustration of his attempts to give his side of the story violated inmate's constitutional rights." It ruled that the burden of showing good faith was on the disciplinary board, which could be assessed punitive damages if indeed it had deprived the plaintiff of his constitutional rights. The value of such rights, it said, "must be considered great."

In Thompson v Burke (1977) 1556 F.2d 231, the court likewise ruled that a parole board's action in revoking a parole without a hearing was "not adjudicatory."

In 1974 the Supreme Court ruled that a school official also may not claim absolute immunity if he knew, or should have known, that he was violating a constitutional right (Wood v Strickland, 1974, 420 US 308).

No less than a parole board or a school official, Judge Smith is expected to know the constitutional guarantee of due process. If he abuses it, he is entitled to ask for no mercy or immunity.

When Secretary of Agriculture Earl Butz asked for judicial immunity, saying his ruling against an agricultural trading company was a judicial act (Butz v Economou, 1978, 438 US 478), the Supreme Court rejected his argument, saying he had gone "manifestly beyond the line of duty" and "exceeded constitutional limits." It said absolute immunity for officials "who knowingly and deliberately violate constitutional rights is contrary to the course of decisions in this Court from the very early days of the republic." It added that there are "well established and unambiguous constitutional limits on power," and officials "may not with impunity ignore them" (id at 490, 494).

Butz had asked for immunity, even if he infringed a constitutional right and even if his action was knowing and deliberate.

The Court commented tersely:

"We are quite sure this is unsound, and consequently reject it."

It added:

"Executive officials may not with impunity act in a way that is clearly known to them to violate the Constitution or transgresses a clearly established constitutional rule, or go manifestly beyond the line of duty or stray beyond the plain limits of statutory authority."

It said, "It is not unfair to hold liable the official who knows, or should know, he is acting outside the law. Insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment."

As the Yale Law Journal(1969, vol 79, p 332) wrote:

"A citizen can legitimately expect an officer of the law to act only with due respect to individual rights; if he deliberately does not respect those rights and causes injury, he is not acting within the protection of his commission."

Judges have been held liable for damages for punch- a citizen in the nose in court (Gregory v Thompson, 1976, 500 f.2d 59). The court ruled that the right to be secure from assault is grounded in the due process clause of the Fourteenth Amendment.

Judges have also been held liable in administering juvenile detention centers (Doe v County of Lake, supra); for keeping blacks off juries (Ex Parte Virginia, 1879, 100 US 339; for summarily arresting a coffee vendor for serving "bad coffee" (Zarcone v Perry, 1978, 572 F.2d), and for racially smearing a police officer (National Law Journal, Sept 3 1979).

In one celebrated recent case, a judge had locked up a man at gunpoint at midnight, forged his name to a guilty plea and waiver of trial, and sentenced him to eight months in jail without a trial (Lopez v Vanderwater, 1980, 620 F.2d 1229. The court ruled that the judge was liable, saying, "When the limits of legitimate authority are wholly abandoned, the judge's acts may cease to be 'judicial.'

All these were serious wrongs perpetrated by judges. But they pale to insignificance in comparison to Selwyn Smith's amazing action. I would much prefer to be punched in the nose (which federal courts say is not allowed) than to have my constitutional right to a fair trial ripped up (which the Virginia Supreme Court says is "normal"). Smith has assaulted, not one man's nose, but the fundamental rights of all American citizens, the very bedrock of American jurisprudence and constitutional protections.

In Ex Parte Young (1907, 209 US 123), the Court declared:

"The attempt of a state officer to enforce an unconstitutional statue is a proceeding without authority... and is an illegal act, and the officer is stripped of his official character and is subjected in his person to the consequences of his individual conduct."

By his action, Smith has gone manifestly beyond the line of duty and knowingly and deliberately violated "well established and unambiguous constitutional limits on powers." He has thus failed to meet the test of immunity laid down by this Court and has forfeited his claim to immunity.

This Court eloquently summed up the argument in 1882 in US v Lee (106 US 1961), when it declared:

"No person shall be deprived of life, liberty, or property without due process of law....

"No man in this country is so high that he is above the law. No officer of the law may set the law at defiance with impunity. All officers of the government, from the highest to the least, are creatures of the law, and are bound to obey it."

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinions of the Virginia Supreme Court.

Respectfully submitted,
John B Holway
Pro Se